

Language in blue addresses previous concerns EPA raised or feedback from the advisory committee. For this mtg I'd particularly like you to look at the following portions:

- 102.041(4)(c) *Use assignment*

- 102.047(5) *Publication of revised designated uses...*

(the rest is other related portions you may want to refer to, but you don't have to read thoroughly)

**NR 102.041(4) AQUATIC LIFE USE.** (a) *Categories.* All surface waters or portions thereof shall be assigned an aquatic life use under this subsection. Except as specified in par. (b), all waterbodies shall be considered suitable for the protection and propagation of a balanced aquatic life community as provided in the federal water pollution control act amendments of 1972, P.L. 92 500; 33 USC 1251 et seq. They shall maintain their ecosystem functions and support the growth, development, reproduction, and life cycle of the aquatic life communities expected of their designated use categories, although they may exhibit moderate changes in structure due to loss of some rare native taxa or shifts in relative abundance.

1. Macroinvertebrate. Macroinvertebrate waters have few or no fish due to naturally low or intermittent flows or other natural factors, but a variety of aquatic invertebrates are common, at least seasonally. Ephemeral waters are classified as naturally tolerant macroinvertebrate waters as specified in par. (b) 1.

2. Cold. Cold waters are those streams, rivers, lakes and ponds capable of supporting a community of cold water fish and other aquatic life, or serving as a spawning area for these species. This includes the following:

a. All waters classified as trout class 1 or 2 under s. NR 1.02 (7).

b. All waters verified by the department as stratified two-story fishery lakes.

c. The Great Lakes. Great Lakes shall also be considered trout waters.

d. Other waters with sufficient groundwater or cold surface water input to support a coldwater fish community.

3. Warm. Warm waters are those streams, rivers, lakes and ponds capable of supporting a community of warm water or transitional fish and other aquatic life or serving as a spawning area for these species.

4. Wetland. Wetlands are defined in s. 102.03 (7r). Waterbodies listed as wetlands in the Wisconsin Wetland Inventory are designated as wetland unless the department designates a different use category based on sufficient field data.

(b) *Exceptions.* All waterbodies shall attain their aquatic life uses in par. (a) except those specified in this paragraph. The department may assign a waterbody to one of the categories in subd. 1 or 2 in addition to its use under par. (a). Such waters exhibit a marked reduction in sensitive taxa, an unbalanced distribution of major taxonomic groups, and reduced complexity of ecosystem structure, as compared to other waterbodies of the same aquatic life use category.

1. Naturally tolerant community. If a waterbody has distinct natural characteristics that make its expected aquatic life community more tolerant to adverse conditions or less diverse than other waters in the same use category, the department may classify it as a naturally tolerant community. Ephemeral waters in par. (a) 1 are classified as naturally tolerant.

**Note:** Examples of waterbodies impacted by natural factors are high-gradient streams, wetland dominated streams, and naturally acidic bog lakes.

2. Modified. If the department demonstrates through a use attainability analysis under s. NR 102.047 (2) that one or more of a waterbody's biocriteria under subch. III are unattainable due to uncontrollable human-caused factors, the waterbody may be classified as modified. Waters classified as modified that are later determined to be attaining biocriteria in subch. III shall have their modified designation removed.

3. Wastewater effluent channels. Wastewater effluent channels as defined in s. 102.03 (7g) are not naturally occurring and are not expected to attain the aquatic life uses in par. (a).

4. Limited Use Categories. Limited forage fish and limited aquatic life are historic use categories that shall be phased out over time, and no new waterbodies shall be placed into the limited use categories. Until such time that waterbodies listed in ss. NR 104.05 to 104.10 are redesignated into the aquatic life use categories in pars. (a) to (b), the following two limited categories will remain in effect for the waterbodies remaining in these categories.

a. Limited forage fish communities. This subcategory includes surface waters of limited capacity and naturally poor water quality or habitat. These surface waters are capable of supporting only a limited community of forage fish and other aquatic life.

b. Limited aquatic life. This subcategory includes surface waters of severely limited capacity and naturally poor water quality or habitat. These surface waters are capable of supporting only a limited community of aquatic life.

(c) *Use assignment.* Waterbodies with sufficient field data to make an aquatic life use subcategory determination shall be assigned to one of the use subcategories in par. (a). Waterbodies with insufficient data to designate a use based on field data shall be assigned a default aquatic life use from **par. (a)** based on the waterbody's physical characteristics and the aquatic community it is predicted to be capable of supporting, as in **subds. 1 to 3**. Correction of a waterbody's default use subcategory based on field verification to a subcategory more accurately reflecting its natural state does not require a use attainability analysis under **s. NR 102.047 (2)**.

1. Inland lakes and reservoirs not classified as two-story fishery lakes under **sub. (b)** shall be assigned a default use of warm.

2. Streams and rivers not classified as trout class 1 or 2 waters under s. NR 1.02 (7) shall be assigned a default use through application of the department's Wisconsin Stream Natural Community Model, except as specified in **subd. 3**.

**Note:** Modeled natural communities and associated designated uses are available to the public via the department's online mapping tool, the Water Condition Viewer. The Wisconsin Stream Natural Community Model is described in: Lyons, J. 2008. "Using the Wisconsin Stream Model to Estimate the Potential Natural Community of Wisconsin Streams (DRAFT)". Wisconsin Dept. of Natural Resources Fish and Aquatic Life Research Section. Madison, WI.

3. Streams with an outfall covered under an individual WPDES permit as of [the date this rule takes effect] that are not trout class 1 or 2 waters or designated as limited aquatic life or limited forage fish under ch. NR 104 as of that date shall receive an interim, default waterbody type of Warmwater until such time that the department verifies and updates the waterbody type under par. (f) or s. NR 102.047.

**Comment [KM1]:** We will need to decide whether to keep this statement, or the one under "Revisions" saying that a change that would affect a permit would go through promulgation, or both.

**NR 102.047 Revising individual waterbodies' designated uses or criteria. (1) GENERAL.** A revision to designated uses or criteria is a long-term change to water quality standards for individual waterbodies, waterbody segments, or groups of waterbodies. This section does not apply to changes to statewide water quality standards. The department may revise or remove uses and criteria that were assigned under **s. NR 102.043** as new information or advancing technology provide sound scientific rationale that a different use is more appropriate. When a waterbody's use is revised, the criteria applicable to the new use apply unless the department also revises the waterbody's criteria or biocriteria. The newly applicable criteria may be either more or less stringent to reflect the revised use.

**Note:** Common cases for use revisions include previously unassessed waterbodies with new monitoring data, and waterbodies that are channelized, effluent dominated, or downstream from impoundments. For effluent dominated streams, the quantity of both natural flow and effluent flow will be taken into account together, along with the aquatic habitat they create, when assigning a revised use.

**(2) REVISING AQUATIC LIFE OR RECREATION USES: USE ATTAINABILITY ANALYSIS.** Except for field verifications specified in **s. NR 102.043 (4)**, any revision to a waterbody's recreational or aquatic life use that would result in application of less-stringent water quality criteria or removal of criteria must be done by the department through a use attainability analysis. Revisions to uses other than aquatic life or recreation, or redesignation to a use with equal or more-stringent water quality criteria, do not require a use attainability analysis. The department may revise or remove a surface water's use if the department determines all of the conditions in **pars. (a) to (c)** are met.

(a) The waterbody is not supporting its designated use, and has not supported it since November 28, 1975. To make a determination that a waterbody has supported its use since 1975, the department shall provide reasonable documentation or justification that during that time frame the use has actually occurred and the water quality necessary to support the use has been attained.

(b) The source or cause of the waterbody's non-attainment of the use is uncontrollable for the foreseeable future. This means that within the large-scale land use patterns of the watershed, it is not feasible to begin establishment of best management practices within the foreseeable future (approximately twenty years after the assessment date) that would be needed to attain the use, or such practices are not likely to achieve attainment of the use even if established.

(c) The reason for the waterbody's non-attainment is one of the following:

1. Naturally occurring pollutant concentrations prevent the attainment of the use.
2. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met.
3. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place.
4. Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the waterbody to its original condition or to operate such modification in a way that would result in the attainment of the use.
5. Physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life uses.
6. Controls more stringent than those required by sections 301(b) and 306 of the Clean Water Act would result in substantial and widespread economic and social impact.

(d) In cases where **par. (c) 6** is under consideration, the party seeking a use revision shall prepare a socioeconomic analysis, including an assessment of what the highest use is that is economically attainable. The department shall determine whether the socioeconomic analysis justifies a use revision under **par. (c) 6**, and what the highest economically attainable use is.

(e) If the department adopts a revised use based on a use attainability analysis, it shall adopt the highest attainable use. The highest attainable use is the revised use that is both closest to a full aquatic life, wildlife, or recreation use, and attainable. If the use revision is based on a socioeconomic analysis under **pars. (c) 6 and (d)**, the highest attainable use shall be based on the highest economically attainable use.

**(3) REVISING OTHER USES: USE AND VALUE DEMONSTRATION.** The department may revise or remove a use other than recreational or aquatic life uses if it supports the revision through a use and value demonstration. The department shall submit to U.S. EPA documentation justifying how its consideration of the use and value of a waterbody for uses under consideration appropriately supports the department's action. A use attainability analysis is not required but may be used to satisfy this requirement.

**(4) REVISING CRITERIA: SITE-SPECIFIC CRITERIA.** (a) The department may develop a less-stringent or more-stringent site-specific criterion for any parameter if it demonstrates through sound scientific rationale that a different criterion is more appropriate for a waterbody and is protective of the waterbody's designated uses. This may include any of the following cases:

1. A waterbody's use is revised or removed and different criteria are more appropriate for supporting the revised use.
2. A substance or parameter is naturally occurring within a waterbody at levels that either cause non-attainment of the statewide criteria or are more protective than the statewide criteria and are necessary to support the waterbody's designated use.
3. A substance or parameter's statewide criterion is not appropriate for a waterbody due to characteristics of the waterbody.

(b) The department shall either establish by rule a standard methodology for developing numeric site-specific criteria for a given parameter, or promulgate the numeric value of a site-specific criterion for an individual waterbody if a standardized method has not been promulgated or if the site-specific criteria was developed using an alternative approach instead of a standardized promulgated method.

(c) A site-specific criterion shall only be applicable to the identified surface waterbody(ies) or segment(s), and shall replace the statewide criterion for that waterbody.

**Note:** For additional information on developing site-specific criteria for certain pollutants see the following: Temperature: s. NR 102.27; toxic substances: s. NR 105.02 (1); phosphorus: s. NR 102.06 (7) and subch. II of ch. NR 119; biocriteria: s. NR 102.42 (6) and s. NR 104.013 (1) (f).

**(5) PUBLICATION OF REVISED DESIGNATED USES OR SITE-SPECIFIC CRITERIA FOR INDIVIDUAL WATERBODIES.** The department shall publish any revised designated uses and site-specific criteria for individual waterbodies at least every three years using procedures in this subsection. **Any revision to designated uses or site-specific criteria shall be consistent with 40 C.F.R. s. 131.** (a) *General.* The department shall conduct the following steps:

1. Document the justification for the change and retain it in a format available to the public.
2. Provide public notice of the proposed change on the department's website and provide a 45-day public comment period and public hearing.

3. **Either provide a final approval decision or promulgate the revision, as follows:** a. For revisions except those specified in par. (b), a streamlined process may be used in which promulgation is not required. For streamlined revisions the department shall make a final approval determination on the proposed change. The department's secretary or secretary's designee shall sign the department's final determination. This determination will not take effect until approved by U.S. EPA.

- b. For exceptions to the streamlined process specified in par. (b), any revision shall be promulgated before the department submits it to U.S. EPA for review under subd. 4.

4. Submit the department's final determination for any proposed change to the U.S. EPA for its approval decision.

5. If all of the steps under subds. 1 to 4 are followed and the department and U.S. EPA approve the change, the department shall publish the updated designated use or site-specific criteria using a publicly-accessible data system or digital mapping format. **For streamlined revisions,** the updated uses and criteria shall take effect upon this publication.

**Note:** The department's water quality standards website can be accessed at: <http://dnr.wi.gov/topic/surfacewater/standards.html>.

**(b) Exceptions.** The following revisions are not eligible for streamlined processing and require promulgation under par. (a) 3 b:

1. Updates to uses and site-specific criteria based on alternative methods. If a standardized, promulgated method is not available for developing a site-specific criterion or revising a designated use, or if the department determines that an alternative method is more appropriate, an alternative method may be used. A site-specific criterion or designated use change based on alternative methods requires promulgation of the new criterion or use and approval by the department and U.S. EPA before taking effect.

**Note:** There may be specific procedural requirements for establishing site-specific criteria for certain substances in other chapters of Wis. Adm. Code.

2. If the department determines that a change to a designated use would require a major facility upgrade for an existing individual WPDES permittee, the designated use change shall be promulgated before submittal to U.S. EPA in par. (a) 4.

**Note:** Typically, subd. 2 would be triggered by significant capital improvements to increase capacity or provide additional treatment capability, but would not be triggered by operational adjustments or minor chemical treatment adjustments.

3. If the department receives a written request for rulemaking regarding a change to one or more individual waterbodies' uses or site-specific criteria during the public comment period, the department may submit a request for rulemaking to the Governor.

**Comment [KM2]:** Is it more correct (for WI & EPA) to say "final approval decision" or "final determination"?